Supreme Court, U.S.
FILED
APR 8 2004
OFFICE OF THE CLERK

No. 02-1192

In the Supreme Court of the United States

COOPER INDUSTRIES, INC., *Petitioner,*

v.

AVIALL SERVICES, INC., *Respondent.*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR ATLANTIC RICHFIELD COMPANY, BLUEWATER NETWORK, FEDERAL MOGUL CORP., CRANE CO., LFR, INC., THE SOURCE GROUP, INC., AND GEOMATRIX CONSULTANTS, INC. AS *AMICI CURIAE* SUPPORTING RESPONDENT

ALBERT M. COHEN
SMILAND & KACHIGIAN
601 South Fifth Street
Seventh Floor
Los Angeles, CA 90071
(213) 891-1010

JOEL M. GROSS
Counsel of Record
THOMAS H. MILCH
THOMAS I. ANDERSON
ARNOLD & PORTER LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000

Attorneys for Amici Curiae
ATLANTIC RICHFIELD
COMPANY, *ET AL.*

TABLE OF CONTENTS

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

I. THE POSITION ARGUED FOR BY PETITIONER WOULD SUBSTANTIALLY UNDERMINE THREE IMPORTANT POLICY OBJECTIVES OF CERCLA 4

A. The Enforcement Objectives of CERCLA 4

1. Encouraging Private Party Cleanup 5

2. Reducing Litigation and Transaction Costs 7

3. Facilitating Fairness 8

B. Petitioner's Position Undermines These Objectives 9

1. Voluntary Cleanups 10

2. Respondents to Section 106 Orders 14

3. Demand Recipients 16

II. PETITIONER'S INTERPRETATION IS CONTRARY TO THE PLAN STATUTORY LANGUAGE OF CERCLA 18

A. The Plain Language of CERCLA § 107 18

B. The Law Before and After SARA 19

C. The Effect of Section 113(f) 21

D. The United States' Changing Position.....22

E. Resolution of Sections 107 and 113 26

F. Distinction from Common Law Contributinon.....28

CONCLUSION.....30

TABLE OF AUTHORITIES

Page(s)

CASES

Amcast Indus. Corp. v. Detrex Corp.,
2 F.3d 746 (7th Cir. 1993).....18

Aviall Servs., Inc. v. Cooper Indus., Inc.,
263 F. 3d 134 (5th Cir. 2001).....15

Aviall Servs., Inc. v. Cooper Indus., Inc.,
312 F. 3d 677 (5th Cir. 2002).....15, 20

Axel Johnson, Inc. v. Carroll Carolina Oil Co.,
191 F.3d 409 (4th Cir. 1999).....21, 22

Bedford Affiliates v. Sills,
156 F. 3d 416 (2d Cir. 1998).....22

Bulk Distribution Ctrs., Inc. v. Monsanto Co.,
589 F. Supp. 1437 (S.D. Fla. 1984) 19

Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344 (6th Cir. 1998).....21, 24, 25

Chapman v. Houston Welfare Rights Org.,
441 U.S. 600 (1979).....10

City of Philadelphia v. Stepan Chemical Co.,
544 F. Supp. 1135 (E.D. Pa. 1982) 19

Colorado v. ASARCO, Inc.,
608 F.Supp. 1484 (D. Colo. 1985).....9

Comm'r of Internal Revenue v. Engle,
464 U.S. 206 (1984).....10

Griffin v. Oceanic Contractors, Inc.,
458 U.S. 564 (1982).....10

In re Bell Petroleum Services, Inc.,
3 F.3d 889 (5th Cir. 1993).....17

In re Reading Co.,
115 F.3d 1111 (3d Cir. 1997).....27

Key Tronic Corp. v. United States,
511 U.S. 809 (1994).....3, 5, 18, 27

Morrison Enter. v. McShares, Inc.,
302 F.3d 1127 (10th Cir. 2002).....13, 28
NL Indus., Inc. v. Kaplan,
792 F. 2d 896 (9th Cir. 1986).....19
Northwest Airlines, Inc. v. Transport Workers Union
of Am., 451 U.S. 77 (1981).....9
Pinal Creek Grp. v. Newmont Mining Corp.,
118 F.3d 1298 (9th Cir. 1997).....21, 24
Rodriguez v. United States,
480 U.S. 522 (1987).....19
San Francisco v. Assessment Appeals Bd.,
122 F.3d 1274 (9th Cir. 1997).....19
United States v. Chem-Dyne Corp.,
572 F. Supp. 802 (S.D. Ohio 1983).....8
Violet v. Picillo,
613 F.Supp. 1563 (D.R.I. 1985).....20
W. Props. Serv. Corp. v. Shell Oil Co.,
358 F. 3d 678 (9th Cir. 2004).....28
Watt v. Alaska,
451 U.S. 259 (1981).....26
Wickland Oil Terminals v. Asarco, Inc.,
792 F. 2d 887 (9th Cir. 1986).....19

STATUTES

Small Business Liability Relief and Brownfields
Revitalization Act, Pub. L. No. 107-118, 115
Stat. 2356 (2002).....6
Clean Air Act, 42 U.S.C. § 7604(e).....27
Comprehensive Environmental Response,
Compensation, and Liability Act (CERCLA),
42 U.S.C. 9601 *et seq*.....passim
42 U.S.C. § 9601(35).....11
42 U.S.C. § 9601(40).....11
42 U.S.C. § 9606(b).....16
42 U.S.C. § 9607(a).....16
42 U.S.C. § 9607(a)(4)(A)-(B).....18

42 U.S.C. § 9607(a)(4)(B).....13, 26
42 U.S.C. § 9607(c)(3).....16
42 U.S.C. § 9613(f)(1).....21, 26
42 U.S.C. § 9613(f)(3).....28
42 U.S.C. § 9613(f).....27
42 U.S.C. § 9622.....12
Uniform Comparative Fault Act.....15
Uniform Contribution Among Tortfeasors Act..... 15, 29-30

REGULATIONS AND ADMINISTRATIVE MATERIALS

40 C.F.R. pt 300.....14
50 Fed. Reg. 47,912, 47,934 (Nov. 20, 1985).....19
53 Fed. Reg. 51,394, 51,462 (Dec. 21, 1988).....14
55 Fed. Reg. 8666, 8792-93 (Mar. 8, 1990).....13
EPA, Documentation of Reason(s) for Not Issuing
CERCLA Section 106 UAOs to All Identified
PRPs (Aug. 2, 1996),
http://www.epa.gov/compliance/resources/
policies/cleanup/superfund/reason-cer106-
rpt.pdf.....14
EPA, Interim CERCLA Settlement Policy, 50 Fed.
Reg. 5034 (Feb. 5, 1985).....29
EPA, Interim Guidance on Orphan Share
Compensation for Settlors of Remedial
Design/Remedial Action and Non-Time-
Critical Removals (June 3, 1996),
http://www.epa.gov/compliance/resources/pol
icies/cleanup/superfund/orphan-share-rpt.pdf.....4
EPA, Model RD/RA Consent Decree (May 2001),
www.epa.gov/compliance/resources/policies/
cleanup/superfund/mod-rdra-cd.pdf.....12

Notice of Availability of Final Draft Guidance for Developing Superfund Memoranda of Agreement (MOA) Language Concerning State Voluntary Cleanup Programs, 62 Fed. Reg. 47,495 (Sept. 9, 1997) 6, 7

LEGISLATIVE MATERIALS

131 Cong. Rec. 16573 (1985) 5, 8
Comm. on Public Works and Transp., 99th Cong., 549 (1985) 6
H.R. Doc. No. 99-32, at 73 (1985) 7, 20
H.R. Rep. No. 99-253, pt. 1, at 80 (1985) 5
H.R. Rep. No. 253, 99th Cong., at 18-19 (1985) 20
Reauthorization of Superfund, Hearings Before the House Subcomm. on Water Res. of the Comm. on Public Works and Transp., 99th Cong. 549 (1985) 6
S. Rep. No. 99-11, at 44 (1985) 20
S. Rep. No. 107-2, at 15 (2001) 6
Oversight Hearings Before the House Subcomm. on Admin. Law and Governmental Relations, Comm. on the Judiciary, 99th Cong., 51 (1985) 9
Superfund Improvement Act of 1985, Hearing Before the Senate Comm. on Env't and Public Works, 99th Cong., at 52-53 (1985) 7
Superfund Reauthorization: Judicial and Legal Issues, Oversight Hearing before the House Subcom. on Admin. Law and Governmental Relations, Comm. on the Judiciary, 99th Cong., 38 (1985) 8

MISCELLANEOUS

Environmental Law Institute, *An Analysis of State Superfund Programs*, 34 (2002) 16

Inside EPA Environmental Policy Alert, *Aviall May Divert Superfund Enforcement Fund, EPA Official Says* (February 4, 2004) 13
Prosser, Law of Torts § 50 (4th ed. 1982) 9

In the Supreme Court of the United States

COOPER INDUSTRIES, INC., *Petitioner,*

v.

AVIALL SERVICES, INC., *Respondent.*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR ATLANTIC RICHFIELD COMPANY, ET AL. AS AMICI CURIAE SUPPORTING RESPONDENT

INTEREST OF AMICI CURIAE[1]

Amici have diverse interests in cleanup of contaminated property under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. 9601 *et seq.*, but all share the view that CERCLA should be interpreted to encourage and not penalize responsible parties who step forward to undertake prompt and environmentally protective cleanups of contaminated sites. All share an interest in an interpretation of CERCLA that is consistent with its language and purpose and the long-standing policy and practice of the United States Environmental Protection Agency ("EPA").

[1] In accordance with Rule 37.6, *amici curiae* certify that counsel for a party did not author this brief in whole or in part and that no entity other than the *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

Atlantic Richfield Company, Federal Mogul Corporation and Crane Company are potentially responsible parties at numerous CERCLA sites, and have frequently expended funds to clean up contaminated property in reliance on the right to seek contribution from other responsible parties under CERCLA. Accordingly, these corporations have a substantial interest in prompt, efficient and effective cleanups under CERCLA, without the requirement of unnecessary litigation, and in the availability of contribution for responsible parties who have incurred cleanup costs.

Amicus Bluewater Network is an environmental organization with membership throughout the United States dedicated to championing innovative solutions and inspiring individuals to protect the earth's finite and vulnerable ecosystem. It and its members have an interest in ensuring that responsible private parties will continue to undertake cleanups of contaminated sites that protect the environment.

Amici LFR, Inc., the Source Group, Inc., and Geomatrix Consultants, Inc. are engineering and consulting firms that regularly conduct and oversee cleanup of contaminated properties under CERCLA. They have a substantial concern that the position advanced by Petitioner could result in a less efficient cleanup process under CERCLA.

SUMMARY OF ARGUMENT

The overarching objective of CERCLA is to facilitate the prompt cleanup of contaminated sites at which there have been releases of hazardous substances, so as to protect human health and the environment. CERCLA Sections 107(a) and 113(f) encourage private persons to undertake prompt cleanup action by allowing persons who incur cleanup costs to seek contribution from parties who also have liability for contamination at the site, but who have not acted in the same timely manner. Petitioner argues that contribution should only be available to persons who wait for the government to bring an enforcement action against them, or who have settled with the government. If this position

were adopted, it would severely undermine CERCLA's core objectives by discouraging private parties from undertaking prompt, high-quality cleanups of contaminated sites. It would instead encourage those parties to delay cleanup until the government files suit, so that they do not lose their ability to seek cost recovery or contribution from any other parties who may be liable for cleanup costs at the same site. This would lead to unnecessary litigation, which would both divert scarce governmental resources from more pressing needs and increase the cost of the Superfund process for parties who have, until now, been willing to undertake cleanups without litigation. And the result would compromise the overall fairness of the CERCLA liability scheme by penalizing those who undertake cleanups voluntarily and rewarding those who do not.

Not only is Petitioner's position at odds with the objectives of CERCLA, it is also at odds with the statute's specific terms. When viewed in the context of the entire statute, this interpretation is premised on a tortured reading of CERCLA, which ignores the plain language of Section 107 allowing any private party who undertakes cleanup to recover costs from other liable parties. It is also at odds with this Court's decision in Key Tronic Corp. v. United States, 511 U.S. 809, 812 (1994), which makes clear that private parties undertaking cleanup can rely on Section 107 and that Sections 107 and 113 must be read together. A review of the history of the these provisions demonstrates quite clearly that Congress was seeking to create a broad cost recovery and contribution scheme, not the very narrow and wholly illogical one argued for by Petitioner.

Further, the position taken here by the United States as *amicus* is both incorrect as a matter of law, and also directly contrary to positions it has taken again and again in briefs, including to this Court, in regulations, and in other public pronouncements.

Accordingly, the Court should affirm the *en banc* decision of the Fifth Circuit, which is fully consistent with

both the words Congress wrote and the objectives it sought to achieve in enacting and amending CERCLA.

ARGUMENT

I. THE POSITION ARGUED FOR BY PETITIONER WOULD SUBSTANTIALLY UNDERMINE THREE IMPORTANT POLICY OBJECTIVES OF CERCLA

A. The Enforcement Objectives of CERCLA

In 23 years since CERCLA's enactment, three fundamental goals have provided the basis for EPA's implementation of the statute, and each of these goals is reinforced repeatedly in the text of the statute, its legislative history, and judicial decisions. These three goals have been (1) to promote rapid and effective cleanup of contaminated property by private parties, (2) to provide greater fairness in the joint and several liability scheme of CERCLA, and (3) to reduce litigation and transaction costs. See, e.g., EPA, Interim Guidance on Orphan Share Compensation for Settlors of Remedial Design/Remedial Action and Non-Time-Critical Removals (June 3, 1996), http://www.epa.gov/compliance/resources/policies/cleanup/superfund/orphan-share-rpt.pdf (stating that goals of enforcement policy reform are "to provide greater fairness, reduce litigation and transaction costs, and promote private party cleanup of Superfund sites."). Each of these three goals, long recognized as integral parts of the statutory purpose, would be substantially undermined if Petitioner's narrow interpretation of CERCLA contribution rights were accepted by this Court.

In this section, we first expand on each of these three purposes and its fundamental importance to the effective implementation of CERCLA, and then demonstrate how each would be severely harmed if Petitioner's interpretation of the statute were adopted.

1. Encouraging Private Party Cleanup

Of the three CERCLA enforcement purposes discussed here, promoting prompt and effective cleanup of sites by private parties is in many ways the most important, because cleanup of contaminated sites is why CERCLA exists. And it is no surprise that this purpose has been reiterated again and again, because Congress emphasized the importance of encouraging private party cleanup in the initial 1980 enactment of CERCLA by clearly providing for recovery of response costs by private parties under Section 107. See Key Tronic, 511 U.S. at 816.

Congress also emphasized the goal of encouraging private party cleanup when debating the 1986 SARA amendments, which amended CERCLA Section 113 to expressly provide a right of contribution. Legislative sponsor Representative Lent stated: "I am especially proud of a key groundbreaking structural reform that will encourage responsible parties to come forward and take responsibility for cleaning up the toxic waste sites they helped create." 131 Cong. Rec. 16573 (1985). The House Report states that a goal of the new provisions is to "encourage private party settlements and cleanups." H.R. Rep. No. 99-253, pt. 1, at 80 (1985).

During Congressional hearings on the SARA amendments, Assistant Attorney General Habicht also articulated the importance of encouraging private party cleanups and encouraging persons to undertake cleanup without an EPA enforcement lawsuit:

> As the Government's goals in this enforcement process become clear, we're confident that the reasonable parties around the country, who've already demonstrated a recognition of what the rules are and what the goals of the Government are, will come forward and will become participants in the cleanup process.

Reauthorization of Superfund, Hearings Before the House Subcommittee on Water Res. of the Comm. on Public Works

and Transp., 99th Cong. 549 (1985) ("Water Resources Hearings").

Congress recently reemphasized the goal of encouraging private party cleanup when it passed the Small Business Liability Relief and Brownfields Revitalization Act. See Pub. L. No. 107-118, 115 Stat. 2356 (2002). These amendments to CERCLA sought, among other things, to stimulate voluntary cleanup programs at the state and local level by providing grants to facilitate private party cleanup of so called "brownfield" sites, contaminated properties with the potential for productive reuse and development. Id. at § 211. The Senate committee report accompanying this legislation recognized the significance of voluntary cleanup to the overall contaminated property problem, observing that "[t]he vast majority of contaminated sites across the Nation will not be cleaned up by the Superfund program." S. Rep. No. 107-2, at 15 (2001).

That same Senate committee report referred with approval to existing EPA policy for reaching Memoranda of Agreement ("MOA") with states on voluntary cleanup programs. Id. In 1997 guidance on drafting MOA with states, EPA clearly indicated its belief that the availability of contribution under CERCLA was an important component of voluntary cleanup programs. See Notice of Availability of Final Draft Guidance for Developing Superfund Memoranda of Agreement (MOA) Language Concerning State Voluntary Cleanup Programs, 62 Fed. Reg. 47,495 (September 9, 1997). The guidance demonstrates EPA's position that a private party taking action under a state voluntary cleanup program can bring a contribution claim against other liable parties under CERCLA Section 113, as long as cleanup complied with the National Contingency Plan ("NCP"): "The MOA should make clear to any private party that recovery of response costs under CERCLA will require that the cleanup action meet the requirements outlined in the National Contingency Plan." Id. at 47,499.

As this EPA guidance indicates, a broad right of contribution is essential for encouraging safe and effective private party cleanup of CERCLA sites. As with the other policy objectives discussed here, this goal is not new. The necessity of broad contribution was emphasized when President Reagan transmitted his administration's proposed Superfund amendment bill, a precursor to SARA, to Congress in 1985. In the explanatory material accompanying the bill, it was acknowledged that "[p]rivate parties may be more willing to assume the financial responsibility for cleanup if they are assured that they can seek contribution from others." H.R. Doc. No. 99-32, at 73 (1985).

2. Reducing Litigation and Transaction Costs

Reducing litigation and transaction costs has long been another important objective of the CERCLA enforcement scheme. During hearings that led to the SARA amendments in 1986, members of Congress expressed concern about the rising legal and transaction costs of the Superfund program. For example, there was the following exchange between Senator Simpson and Assistant Attorney General Habicht:

> Senator Simpson: On this question of transaction costs at sites, which is the lovely phrase which I guess refers to legal and other fees expended during the process, transaction costs, are we seeing the point that legal fees are greater than cleanup costs at some of those sites already? If that is so, is that a good use of our national resources, and what does it imply about the success of Superfund if that is happening.
>
> Mr. Habicht: Senator, I don't have the exact costs of the litigation. I think it is absolutely fair to say, and I feel strongly and I know it represents the administration's view, that litigation is not the most desirable way of resolving issues . . . .

Superfund Improvement Act of 1985, Hearing Before the Senate Comm. on Env't and Public Works, 99th Cong., at 52-53 (1985).

This theme is repeated throughout the SARA legislative history. For example, Mr. Habicht also testified that the success of the Superfund enforcement program rested in part on its ability to "discourage unnecessary and costly litigation."[2] Superfund Reauthorization: Judicial and Legal Issues, Oversight Hearing before the House Subcom. on Admin. Law and Governmental Relations, Comm. on the Judiciary, 99th Cong., 38 (1985). Furthermore, the views expressed by the Administration were shared by congressional sponsors of the legislation, such as Representative Lent, who described the House bill as one "that will take the toxic waste cleanup effort out of the courtrooms of America and to the abandoned waste sites where it belongs." 131 Cong. Rec. 16573 (1985).

3. Facilitating Fairness

The government has long argued that CERCLA can impose liability that is joint and several, and that the government can seek to hold a subset of the potentially liable parties at a site responsible for all of the cleanup costs. See, United States v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983). While the government has argued that joint and several liability, while not explicitly set out in the statute, is necessary to achieve programmatic goals, there has also been a recognition that a broad right of contribution was necessary for a fair enforcement process. Assistant Attorney General Habicht emphasized in his Congressional testimony on SARA that "an enforcement process has to be fundamentally fair." Water Resources Hearing at 546. In other Congressional testimony, Mr. Habicht elaborated on the centrality of contribution rights to the statute's fairness,

[2] While a broad right of contribution could, in theory, also increase litigation, the expectation is that most contribution claims can be resolved without protracted litigation. If some litigation is necessary to fairly allocate cleanup costs between numerous responsible private parties, such litigation furthers the overall goals of CERCLA with little, if any, added expense to the government.

stating very simply: "[t]he fairness of a joint and several liability scheme depends upon the clear availability of contribution." Oversight Hearings Before the House Subcomm. on Admin. Law and Governmental Relations, Comm. on the Judiciary, 99th Cong. 51 (1985).

Similarly, judicial decisions have long recognized the importance of contribution to the fairness of a joint and several liability scheme. For example, in Colorado v. ASARCO, Inc., 608 F. Supp. 1484 (D. Colo. 1985), a decision that preceded the 1986 SARA amendments adding Section 113(f), the district court found that there was a right to contribution under CERCLA and that such a right was essential to the fairness of the liability scheme created. The court cited Dean Prosser's recognition that, "contribution is an integral component of joint and several liability." Id. at 1490 (citing Prosser, Law of Torts § 50 (4th ed. 1982)). The court in ASARCO also cited this Court's recognition of the fairness of allowing contribution among parties who have joint and several liability. Id. (citing Northwest Airlines, Inc. v. Transport Workers Union of Am., 451 U.S. 77 (1981)).

B. Petitioner's Position Undermines These Objectives

The interpretation argued for by Petitioner would result in a CERCLA enforcement scheme that substantially diminishes incentives for voluntary cleanups by private parties, increases litigation costs, and is less fair. The United States does not dispute these points, but instead contends (at pp. 26-28) that, given what it perceives as clear statutory language, these arguments should be made to Congress in the context of a possible legislative enhancement, not to this Court in deciding the interpretation of the existing statute. But in interpreting the statutory language, the overarching objectives of the statute are of great significance. It is a black letter rule of statutory construction that a statute should not be interpreted in a manner that would be irrationally at odds with the very purposes of the statute. See, e.g., Comm'r of Internal Revenue v. Engle, 464 U.S. 206, 217 (1984) ("Our duty then is 'to find that interpretation which

can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested.'"); Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982) ("It is true that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."); Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 608 (1979) ("As in all cases of statutory construction, our task is to interpret the words of [the statute] in light of the purposes Congress sought to serve."). Petitioner's view of the statute is exactly such an irrational interpretation.

In examining the effect of Petitioner's position—that contribution is only available under CERCLA to parties who have been sued or who have settled with EPA—it is useful to consider three very different contexts where this interpretation would produce absurd results that could not possibly have been intended by Congress.

1. Voluntary Cleanups

The first category is the type of situation presented by the facts of this case: a party that cleans up a site without first being sued by the United States to undertake the cleanup. Such a cleanup might be undertaken by a private party for any number of reasons: the party knows it is liable for some part of the contamination and desires to promptly reduce risks to human health or the environment; the party desires to conduct the cleanup before the situation is exacerbated by contaminant migration or the passage of time; the party desires to avoid liabilities to third parties who may be affected by migrating contamination; or the party wants to take advantage of incentives available for participation in a State voluntary cleanup program. All of these reasons reflect goals that were specifically articulated by Congress and reinforced by EPA policy, and they all support CERCLA's ultimate goal of achieving prompt cleanup. Yet in all of these situations, the party undertaking cleanup would, in

Petitioner's view, have no ability to recover its costs or seek contribution from other liable parties under CERCLA.

Such a result is on its face not fair. The party doing the cleanup may have been only a small contributor to the environmental conditions at the site, or may have liability as the present site owner without having contributed to the contamination at all.[3] Yet despite the fact that there may be other clearly liable and viable parties from whom contribution for the cleanup costs could be sought, under Petitioner's view the party actually doing the cleanup has no ability to sue those other parties. The entire costs of the cleanup would fall on the party who voluntarily remediates the site, and the other parties could escape responsibility altogether.[4] This may be an example of the expression "no good deed goes unpunished." It is certainly not an example of a fair enforcement scheme.

Petitioner's interpretation would also inevitably result in an increase of litigation and transaction costs. A party who wants to preserve its contribution rights would have a strong incentive to wait to do the cleanup until it has been sued, at which point both it and the government would have to incur legal costs. The government would be forced to use its scarce resources to develop a case and be prepared to litigate it, and a party that was willing to do the cleanup without government compulsion would be forced to wait for litigation before taking any cleanup action. While it might seem that the litigation would be simple, and settlement would quickly follow, experience teaches that such litigation is rarely simple, and once it commences the interest of the

---

[3] Present owners of contaminated sites are often liable for those sites even if their actions did not contribute to the contamination in any way. While there are defenses to liability available for some owners of contaminated property, those defenses are not always viable, even for owners who have done nothing to contribute to the contamination. See 42 U.S.C. §§ 9601 (35), (40).

[4] Although a state remedy might be available, that option is limited, as discussed further in Section I.B.2, note 7, *infra*.

government and all parties to protect their legal positions can lead them down a road far away from, not toward, cleanup and settlement. Petitioner's interpretation would compel the government to litigate against defendants who simply want the ability to seek contribution from other liable parties. Litigation would be complicated and more expensive for the government than a voluntary cleanup, and it would inevitably delay the cleanup process.

Alternatively, a party wanting to undertake a cleanup could try to enter into an administrative settlement with the United States, but that process will also result in an increase, perhaps significant, in negotiation and other transaction costs to that party and the United States. Settlements under CERCLA are not *pro forma* matters, but are governed by the detailed requirements of Section 122 of the statute, 42 U.S.C. § 9622, which impose limitations and procedural requirements on how EPA enters into such entitlements. EPA also utilizes complex and lengthy model settlement documents that cannot be negotiated simply and inexpensively.[5]

Senior EPA officials have recognized that there would be increased transaction costs and adverse effects were Petitioner's position adopted. For example, Bill Muno, who has served for many years as the Superfund Director for EPA's largest regional office, has publicly stated that a ruling from this Court adopting Petitioner's position could force EPA to divert limited Superfund enforcement money to sites that liable parties are already remediating voluntarily, thus harming Superfund enforcement and the goal of achieving site cleanups. See Inside EPA Environmental

[5] For example, EPA's Model Consent Decree for agreements to implement remedial action is over 50 pages long with 127 separate provisions. See EPA, Model RD/RA Consent Decree (May 2001), www.epa.gov/compliance/resources/policies/cleanup/superfund/mod-rdra-cd.pdf.

Policy Alert, *Aviall May Divert Superfund Enforcement Fund, EPA Official Says* (February 4, 2004).

Finally, the most unfortunate effect of the acceptance of Petitioner's position would be that fewer voluntary cleanups would be done. Parties who now have an incentive to do cleanups without being sued will analyze the costs and benefits of doing such cleanups differently, and in many cases will not do them. If Petitioner prevails, the net effect will be that there will be more contaminated sites in the United States three, five, and ten years from now than if Respondent prevails.

Such a result would also have a devastating effect on the formal voluntary cleanup programs that many states have adopted with encouragement from EPA, like the Texas program that was utilized by Respondent in this case. Moreover, as mentioned above, EPA has long made it clear that parties participating in such programs should be able to seek recovery of costs from other liable parties under CERCLA. See 55 Fed. Reg. 8666, 8792-93 (Mar. 8, 1990) ("EPA believes that it is important to encourage private parties to perform voluntary cleanups of sites, and to remove unnecessary obstacles to their ability to recover their costs from the parties that are liable for the contamination."). That the United States has decided in this case to completely undermine EPA's long-standing position will greatly weaken EPA's ability to encourage voluntary cleanups under any program.

Not only is the availability of contribution an important incentive for private parties to conduct cleanups, but it is also a powerful incentive for them to conduct good and thorough cleanups. CERCLA provides that a private party can only recover response costs that are "consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B); see also, Morrison Enter. v. McShares, Inc., 302 F.3d 1127, 1135-36 (10th Cir. 2002). The NCP is part of CERCLA's implementing regulations, and it contains detailed requirements for how cleanups are to be conducted. See 40

C.F.R. pt. 300. A party that knows it will have to have to demonstrate compliance with the NCP to recover its costs from other liable parties has a strong incentive to conform to the NCP, which helps ensure that the cleanup is protective of human health and the environment. A party that knows it cannot recover its costs under CERCLA will not have the same incentive to comply with the NCP.

In 1988, EPA recognized this incentive and added provisions to the NCP that were intended to make it easier for a private party undertaking cleanup to know how to comply with the NCP. EPA stated "that providing a list of requirements to be complied with in order to be consistent with the NCP will enhance the probability of a successful cost recovery action, thus providing an incentive to other persons to undertake response actions." 53 Fed. Reg. 51,394, 51,462 (Dec. 21, 1988).

2. Respondents to Section 106 Orders

Section 106 of CERCLA allows EPA to issue orders to liable parties to undertake cleanup. This is a powerful tool, and one that EPA uses frequently. EPA guidance encourages the use of such orders so that liable parties and not EPA will undertake cleanup. EPA guidance also encourages the issuance of such orders to a subset of all the liable parties at a site, based on an assertion of joint and several liability, so that enforcement of the order by EPA will be manageable. See EPA, Documentation of Reason(s) for Not Issuing CERCLA Section 106 UAOs to All Identified PRPs (Aug. 2, 1996), http://www.epa.gov/compliance/resources/policies/cleanup/superfund/reason-cer106-rpt.pdf. What happens, then, if there are 60 liable parties at a site, EPA issues such an order to 30 of those, and only 10 of those agree to comply with the order and in fact undertake the entire cleanup? Can those 10 sue the 20 non-compliers and the 30 non-recipients for contribution?

The Fifth Circuit panel decision recognized the absurdity of denying contribution in such a case, and held that a Section 106 administrative order would qualify as a civil

action for purposes of Section 113(f), thereby providing a predicate for contribution. See Aviall Servs., Inc. v. Cooper Indus., Inc., 263 F. 3d 134, 140 n.5 (5th Cir. 2001). But the United States in its *amicus* brief here (at 22, n. 11) argues that such an order is not a civil action, meaning the compliers would have no CERCLA contribution claim. It is inconceivable how Congress could have intended such a result.[6]

Certainly it is grossly unfair. A small group of compliant parties would be forced to shoulder the entire burden of the cleanup, and the non-compliers and those whom EPA chose not to pursue at all would get a free ride. The result would be even more unfair, and quite strange, if the United States were to sue the non-compliers in federal court and they were ordered by the court to comply with the Section 106 order and participate in the cleanup. Those initial non-compliers—who only performed the cleanup after being sued and ordered by a court to do so—would have a contribution claim for their costs against the non-recipients. And the original compliers, who did precisely what EPA wanted them to do, would have no federal contribution claim.

It is true that in such a situation the compliers with the order might have a contribution claim under state law. But the availability of such a remedy is limited and varies by state.[7] Even if such a remedy were available, the

---

[6] This position also represents an unequivocal reversal of arguments the United States has repeatedly advanced before, as discussed further below.

[7] As the *en banc* court of appeals recognized below, the availability of contribution under state law varies widely. See Aviall Servs., Inc. v. Cooper Indus., Inc., 312 F. 3d 677, 690 n. 28 (5th Cir. 2002) (en banc). Some states allow contribution claims only after judgment has been entered on the underlying liability in a judicial proceeding. Id. Although many states have adopted some version of one of two uniform contribution acts, the Uniform Contribution Among Tortfeasors Act and the Uniform Comparative Fault Act, the availability of such claims will vary greatly depending on the particular state law and the facts of each case. Furthermore, a recent nationwide survey of state Superfund

Footnote continued on next page

contribution claims of the compliers would be adjudicated under state law in the state court, and the contribution claims of the non-compliers would be decided in federal court under federal law, a recipe for total confusion.

Again, the result argued for by Petitioner could increase litigation and transaction costs, as Section 106 order recipients would have an incentive to disobey the order and wait for the United States to sue them. In doing so, they would run the risk of claims for penalties and punitive damages under provisions which were intended to encourage compliance. See 42 U.S.C. §§ 9606(b), 9607(c)(3). Surely, a party should not be put in a position where it is penalized and subject to punitive damages for failure to comply with an order, and also penalized, by loss of its contribution rights, when it fully complies with the same order. Compliance should not trigger a penalty.

3. Demand Recipients

A third situation which would be impacted by Petitioner's argument is that of potentially liable parties who receive cost demands from EPA, where EPA undertakes cleanup itself, and pay the amount demanded. EPA is encouraged by CERCLA to issue such demands, because interest on costs EPA has incurred only begins to run once demands are issued. See 42 U.S.C. § 9607(a) (interest runs from the later of "the date payment of a specified amount is demanded in writing" and the date of the expenditure); see also, In re Bell Petroleum Services, Inc., 3 F.3d 889, 908 (5th Cir. 1993).

Footnote continued from previous page

programs by the Environmental Law Institute found that of the 36 states employing a joint and several liability scheme for contaminated property cleanup costs similar to CERCLA, only 11 provide an explicit right to allocate cleanup costs to other liable parties. See Environmental Law Institute, *An Analysis of State Superfund Programs*, 34 (2002). Because of barriers such as these, contribution under state statutes often will not provide an adequate remedy.

As with Section 106 orders, the party that cooperates with EPA would be penalized by losing its contribution rights because it paid before it was sued. Thus, the party that does what the government has asked it to do loses an important right of contribution, while the parties who do not pay the demand and are instead sued retain a contribution right. Such a result, again, would increase litigation and transaction costs. And while it will not reduce private party cleanups, it will delay the return of money to the Superfund that could be used to clean up other sites.

****

The following chart summarizes how, in these three situations, Petitioner's interpretation would deny contribution rights to those who behave the way the government wants them to, and allow contribution for those who do not:

	Contribution Available	**No Contribution Available**
Voluntary Cleanup	Ignore contamination	Clean up property
EPA § 106 Order	Disobey until sued	Comply with order
EPA Cost Demand	Refuse until sued	Pay the demand

Petitioner's proposed interpretation asks this Court to hold that Congress intended these illogical results. Surely, if there were any reading of the statute to avoid such a result, that would be the preferred reading. As the next section shows, not only is there such a reading, it is the best reading of the statute, and one that the United States has previously endorsed.

II. PETITIONER'S INTERPRETATION IS CONTRARY TO THE PLAIN STATUTORY LANGUAGE OF CERCLA

A. The Plain Language of CERCLA § 107

The plain meaning of Section 107 permits the government or "any other person" to bring a cost recovery claim under CERCLA. See 42 U.S.C. § 9607(a)(4)(A)-(B). As Judge Posner has put it, "[t]he statute is clear that whoever...incurs costs in cleaning up a contaminated site can seek to recover them from any responsible person..." Amcast Indus. Corp. v. Detrex Corp., 2 F.3d 746, 748 (7th Cir. 1993). This Court recognized as much in Key Tronic, when it held that "§ 107 unquestionably provides a cause of action for private parties to seek recovery of cleanup costs . . . ." Key Tronic, 511 U.S. at 818. In Key Tronic, the Court allowed a private party not only to seek contribution for costs it paid the government, but for costs it had itself incurred in locating other potentially liable parties. Id. at 819-20. Although the opinion of the Court was that this private right of action was implied, Justice Scalia argued in dissent, based on "the plain language of these provisions," that private litigants clearly have an express cause of action under Section 107. Id. at 821-22 (J. Scalia dissenting in part, joined by J. Blackmun and J. Thomas).

This could well be the end of the inquiry. CERCLA allows private parties who undertake cleanup to sue liable parties for cost recovery, and the statute does not restrict those who can assert such claims to parties who are not themselves liable under Section 107. Section 107 refers to costs incurred by any other person, and a liable party is certainly that. Petitioner's argument depends on the proposition that Section 107 should be read contrary to its language to prohibit liable parties from seeking cost recovery, and Section 113(f)(1) should be read to exclude contribution claims by parties who haven not been sued.

Before addressing this argument, it is useful to review the state of the law when SARA was enacted.

B. The Law Before and After SARA

It was clear, prior to the enactment of SARA in 1986, that liable parties who conducted cleanup could successfully sue other liable parties pursuant to Section 107(a)(4). For example, in City of Philadelphia v. Stepan Chemical Co., 544 F. Supp. 1135 (E.D. Pa. 1982), the City of Philadelphia, itself a liable party, sued other liable parties under Section 107(a)(4) for the City's costs in cleaning up a landfill. The defendants argued that because the City was liable, it was precluded from relying on Section 107. The district court rejected that argument, "[b]ecause such preclusion is not compelled by the language of CERCLA, by its legislative history, or by the environmental objectives which it is designed to achieve..." Id. at 1142. Other courts that recognized a pre-SARA right of liable parties to sue other liable parties under Section 107 include Wickland Oil Terminals v. Asarco, Inc., 792 F. 2d 887 (9th Cir. 1986); NL Indus., Inc. v. Kaplan, 792 F. 2d 896 (9th Cir. 1986); and Bulk Distribution Ctrs., Inc. v. Monsanto Co., 589 F. Supp. 1437 (S.D. Fla. 1984). EPA also recognized such a right in its pre-SARA promulgation of the NCP. See 50 Fed. Reg. 47, 912, 47,934 (Nov. 20, 1985) (discussing NCP requirements for private party cost recovery).

When Congress amended CERCLA in 1986, it was concerned, as discussed above, about increasing incentives for private party cleanup, and there is not the slightest indication that it intended to take away the existing right of private party cost recovery under Section 107. To adopt Petitioner's view would be to hold that Section 113(f)(1) implicitly repealed an existing right under 107. However, repeals by implication are not favored, and the intent of Congress to repeal must be manifest. See Rodriguez v. United States, 480 U.S. 522, 524 (1987); San Francisco v. Assessment Appeals Bd., 122 F.3d 1274, 1276 (9th Cir. 1997).

Far from expressing an intent to narrow the rights of parties who conducted or financed cleanups, Congress in enacting SARA was interested in expanding those rights. One issue that had arisen pre-SARA was whether a party that was sued for cost recovery or to conduct a cleanup, but had not itself undertaken a cleanup, had a right to contribution, and some pre-SARA courts had found such a right to exist. See, e.g., Violet v. Picillo, 613 F.Supp. 1563, 1573 (D.R.I. 1985). In SARA, Congress added explicit contribution language simply to clarify and confirm that existing right. See S. Rep. No. 99-11, at 44 (1985); H.R. Rep. No. 253, 99th Cong., at 18-19 (1985). See also, Aviall, 312 F. 3d at 684 (citing Congressional reports).

In this process, much attention was given to the question of when that contribution right could be asserted. The United States was initially concerned about having a contribution action appended to its enforcement action, which would complicate and delay the resolution of the government's claims. Therefore, the initial administration proposal provided that "[i]n any civil or administrative action under [Section 107 or 113], any claims for contribution or indemnification shall be brought only after entry of judgment or date of settlement in good faith." H.R. Doc. No. 99-32, at 23 (1985). As proposed, this change would have allowed "the government to limit the number of parties in its actions, so that litigation could be conducted in a more efficient and expeditious manner." Id. at 74. Eventually, the proposed legislation was changed to make it clear that a defendant sued under CERCLA could seek contribution even in the same action in which it itself was sued—in other words, the contribution claim could be brought "during or following" the government's action. But again, there is no indication that this reference to "during or following" was intended to limit contribution rights. To the contrary, Section 113(f)(1) makes clear that it does not "diminish the right of any person to bring an action for

contribution in the absence of a civil action under section [106 or 107]." 42 U.S.C. § 9613 (f)(1).

In other words, Congress initially created an incentive for private party cleanups by creating a right of private party cost recovery in 1980, and then it expanded the rights of cooperating private parties with the 1986 SARA amendments.

C. The Effect of Section 113(f)

Petitioner asserts that Congress eliminated private party cost recovery rights by the promulgation of Section 113(f)(1). This argument, and that of the United States, is premised on the fact that most courts of appeals have interpreted the statute to prohibit parties who themselves are potentially liable under CERCLA from suing other liable parties solely under Section 107, and have instead required that they proceed under Section 113(f). See, e.g., Pinal Creek Grp. v. Newmont Mining Corp., 118 F.3d 1298, 1306 (9th Cir. 1997); Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344, 356 (6th Cir. 1998); Axel Johnson, Inc. v. Carroll Carolina Oil Co., 191 F.3d 409, 415 (4th Cir. 1999).

This judicial interpretation of Section 107, which finds no direct support in the statutory language, has been based almost entirely on the premise that Congress intended such parties to recover cleanup costs from other liable parties through a contribution claim under Section 113. But in these cases, the concern of the courts has been uniformly how such liable parties could seek cost recovery, not whether they could at all. Courts have been concerned that calling such a cost recovery action something other than "contribution" could allow for assertion of joint and several liability by such liable parties or could allow circumvention of the protection from contribution claims given to settlers under section 113(f)(2). See, Axel Johnson, 191 F.3d at 415-16; Centerior Service, 153 F.3d at 352, n.11. But none of these decisions suggested that by recasting the claim as a contribution claim, the claim would be lost altogether. To the contrary, in these

cases that precluded direct Section 107 actions by liable parties, the courts assume that Section 113(f) actions are available. See, Bedford Affiliates v. Sills, 156 F. 3d 416, 425 (2d Cir. 1998) ("Bedford instead must rely on a claim for contribution provided for in CERCLA § 113 (f)(1)"); Pinal Creek, 118 F. 3d at 1301 ("[t]his duality [between Sections 107 and 113] is best implemented by permitting a PRP who has incurred cleanup costs to assert only a contribution claim against other PRPs"); Axel Johnson, 191 F. 3d at 415 (private parties "who are potentially responsible for cleanup costs under § 107 cannot bring § 107 cost recovery actions; rather, such parties 'must seek contribution' under § 113"). These courts provide no indication that they intended to eliminate substantive rights under CERCLA for entire categories of private plaintiffs by characterizing cost recovery claims as contribution claims.

D. The United States' Changing Position

The United States notes that it has consistently argued in favor of this prevailing counter-textual interpretation of Section 107. See Brief of United States at 20, n.9 (citing Brief of United States as *Amicus Curiae* in Support of Defendants-Appellants in Pinal Creek at 10 (9th Cir. 1996) ("Ninth Circuit Pinal Creek Brief")). However, the United States has advanced this argument in the past based on the express argument that all liable parties who incurred cleanup costs were entitled to seek contribution under Section 113.

The Ninth Circuit Pinal Creek Brief is very illuminating. Pinal Creek was a cost recovery action brought by a liable party that had performed a voluntary cleanup—essentially the same situation as that presented here. The United States argued that such a party could seek contribution under Section 113 of CERCLA. The United States asserted that the issue before the court was "the nature of action available to an admittedly liable party that has incurred CERCLA response costs without any judgment, administrative order or settlement compelling cleanup." Ninth Circuit Pinal Creek Brief at 10. The United States closed the summary of its

argument by stating that "[t]he Superfund statute already has built-in incentives to encourage voluntary cleanups: they are less expensive, involve less government control and may result in fair share allocations through Section 113 contribution actions." Id. at 12.

When opposing the petition for writ of certiorari to this Court in Pinal Creek, the United States again made its position clear that a party performing voluntary cleanup could bring a CERCLA contribution claim. In its brief to this Court, the United States stated that "[t]he court of appeals was properly skeptical of the contentions, pressed by petitioners and their *amici*, that its holding would discourage voluntary cleanups." Brief of United States as *Amicus Curiae* Opposing Granting of *Certiorari* in Pinal Creek at 14 (U.S. 1998). The United States further emphasized this point by asserting that "[t]he right to contribution provides a strong additional incentive to engage in a voluntary cleanup," and that, "[a]s the court of appeals recognized, the courts are authorized to take into account a responsible party's cooperation with cleanup efforts when equitably allocating liability among responsible parties under Section 113(f)(1)." Id. at 15.

In the Centerior Service case, the United States again asserted that a liable party could not sue under Section 107. The liable party had received a Section 106 administrative order from EPA, but it had not been sued in a civil action. The United States, while asserting that there should be no Section 107 cost recovery action for such a party, acknowledged that there would certainly be a contribution action under Section 113. In its brief, the United States framed the question before the court of appeals as "the nature of the action available to a potentially responsible party that has incurred CERCLA response costs pursuant to an uncontested CERCLA § 106(a) Administrative Order." Brief of Defendants-Appellees Secretary of Defense, Secretary of Veterans Affairs, and Administrator of National Aeronautics and Space Administration in Centerior Service,

at 6 (6th Cir. 1997) ("Centerior Service Brief"). The answer to this question, as the United States saw it then, was that "such parties are limited to an action for contribution governed by CERCLA § 113." Id. And as in Pinal Creek, the United States argued that "CERCLA also authorizes private parties to bring an action to recover response costs which they incur at a site, voluntarily or under compulsion by the government." Id. at 2.

In fact, the plaintiffs in Pinal Creek and Centerior Service each directly raised the very question at issue here, whether they might actually be precluded from seeking contribution under Section 113 because they had undertaken cleanup voluntarily or pursuant to a unilateral EPA administrative order. See Pinal Creek, 118 F.3d at 1305; Centerior Service, 153 F.3d at 351. The Pinal Creek court concluded that parties undertaking voluntary cleanup were permitted to seek contribution under Section 113, as the United States had argued in its *amicus* brief and would repeat again in opposing certiorari. See Pinal Creek, 118 F.3d at 1304-05 (echoing United States' Ninth Circuit Pinal Creek Brief at 12, *supra*). In Centerior Service, the United States flatly rejected the plaintiff's suggestion that it could not bring a CERCLA contribution claim except "during or following a civil action" under Sections 106 or 107. See Centerior Service Brief at 28. As the United States saw it then, "[t]he plain language of CERCLA § 113(f)(1) is not restrictive, i.e., it does not say that a contribution action may only be brought during or following a civil action under CERCLA." Id. (emphasis in original). The United States further argued that such a restrictive construction of Section 113 was particularly untenable in light of the provision that nothing therein "shall diminish the right of any person to bring an action for contribution in the absence of a civil action under" Sections 106 or 107. Id. at 28-29 (emphasis in original). Accordingly, the court of appeals in Centerior Service ruled that a Section 106 administrative order was sufficient to trigger contribution rights under CERCLA,

stating that it was "disingenuous at best for the plaintiffs, who have not challenged their status as PRPs, to claim their action is not one for contribution simply because the EPA was not forced to take them to court." Centerior Serv., 153 F.3d at 352.[8]

The plaintiff's argument in Centerior Service may have rightly seemed disingenuous at the time, when the United States was clearly and unequivocally arguing that the plain language of the statute allowed a CERCLA contribution claim for parties who engaged in cleanup without being sued. Yet today, the United States takes precisely the opposite position, arguing (at p. 22-23, n.11) that a liable party must wait for EPA to take them to court before contribution is available under CERCLA.

However, the plaintiffs in Pinal Creek and Centerior Service prophetically foresaw the nightmare scenario that might face the willing party who was deemed too culpable to bring a claim under Section 107, which by its plain language is available to any person, but not culpable enough, because it had not forced litigation, to seek contribution under Section 113. The United States directly argued that this scenario would not come to pass because voluntary and administratively compelled cleanup expenditures could be recovered in CERCLA contribution suits, and the courts of appeals accepted this argument when interpreting the statute. Now the United States has reversed its position, and not only does that reversal reflect bad policy that contradicts CERCLA's express language and widely recognized goals, but it upsets the expectations of private parties and federal courts that relied on the previous representations of the

---

[8] Although the United States' position on the issue was clear in its brief, the Centerior Service court expressly reserved judgment on the question addressed in Pinal Creek, whether a party undertaking cleanup without any government compulsion whatsoever was entitled to seek contribution under CERCLA. See Centerior Service, 153 F.3d at 351, n.10.

United States when interpreting the statute. Given this recent change in position, the United States' latest interpretation of the statute should not be given any special deference. See Watt v. Alaska, 451 U.S. 259, 272-73 (1981). In fact, deference should be given to the initial position of the United States, which parties and courts relied on for many years as an authoritative interpretation of the statute.[9]

E. Resolution of Sections 107 and 113

The counter-textual result that this collective interpretation of Sections 107 and 113 would compel, entirely denying recovery under CERCLA to an entire class of private parties, can be resolved in one of two ways. The simplest way is to reject Petitioner's construction of Section 113(f) and conclude, as the United States argued in Centerior Service and the full court of appeals concluded here, that the first sentence of Section 113(f) has no limiting effect because it does not say that a party may only bring a contribution claim "during or following" another civil action under CERCLA. This provision simply clarifies that a contribution

[9] The Pinal Creek and Centerior Service briefs are but two examples of the long line of cases in which the United States has argued the exact opposite of what it is arguing here. For example, in the Axel Johnson case, the United States asserted in its brief to the court of appeals that "[w]hen PRPs conduct the cleanup of a site, they may seek to recover some portion of their necessary costs of response form other PRPs. See 42 U.S.C. 9607(a)(4)(B); 9613(f)(1) (providing right of contribution.)" Brief of United States as *Amicus Curiae* Urging Partial Reversal in Axel Johnson at 3 (6th Cir. 1999) ("Axel Johnson Brief"). This stands in sharp contrast to the statement made by the United States in its brief here (at p. 26) that "CERCLA does not create a federal cause of action under which responsible parties may sue each other at any time for costs they have incurred in cleaning up hazardous substances."
The United States acknowledges in its brief (at p. 26) that it may have "nurtured" the assumption that it in essence agreed with Respondent with "errant language" that is at odds with its position here. But these prior inconsistencies in briefs filed in multiple courts of appeals and in this Court are not "errant language." The reality, as demonstrated here, is that the United States is reversing its position, but continues to cite to precedents obtained based in part on its previous use of "errant language."

claim can be brought during a Section 106 or 107 action, and need not wait for the conclusion of the government suit.

The final sentence of Section 113(f)(1) further reinforces this conclusion by providing that nothing in the subsection should be read to preclude "an action for contribution in the absence of" a claim under Sections 106 or 107. 42 U.S.C. § 9613(f)(1). This language differs markedly from savings clauses found in other statutes, that preserve remedies under other laws, in that it does not refer specifically to any other laws and it explicitly refers to the availability of "an action for contribution" without a prior claim under Section 106 or 107.[10] See also, In re Reading Co., 115 F.3d 1111, 1120 (3d Cir. 1997) ("113(f)(1) specifically permits an action for contribution to be brought 'in the absence of a civil action under…section [107]"). Again, the United States recognized this premise in its Centerior Service Brief.

With this provision viewed in its proper context, it is clear that Congress intended Section 113(f)(1) to preserve the clear right to recovery of cleanup costs expended by any private party, which this Court recognized in Key Tronic. What are being "saved" are not only state causes of action, but also the rights created under Section 107 itself. This interpretation of the statute is entirely consistent with the statutory language and purpose, and it is also fully consistent with this Court's decision in Key Tronic, which held that Sections 107 and 113 created overlapping remedies that must be read together. See Key Tronic, 511 U.S. at 816. This interpretation would also avoid the numerous adverse policy implications discussed above, which Congress plainly could not have intended.

However, if the Court concludes that Petitioner's interpretation of the "during or following" language is

[10] For example, a savings provision in the citizen suit section of the Clean Air Act provides that "[n]othing in Section 304 shall restrict any right which any person …may have under any statute or common law…to seek any other relief…" 42 U.S.C. § 7604(e).

correct, it should clarify that a potentially liable private party who has been subject to a state or federal administrative cleanup order or undertaken cleanup voluntarily, but has not been sued under Section 106 or 107 of CERCLA, can recover costs from other liable parties under the "any other person" language of Section 107.[11] This construction would preserve the plain intent of Congress to provide a cause of action for any person that incurs cleanup costs, and it would also resolve confusion among the courts of appeals as to which parties are entitled to bring claims under Section 107. See Morrison Enter. v. McShares, Inc., 302 F.3d at 1134-35 (noting disagreement in courts of appeals).

F. Distinction from Common Law Contribution

The United States contends (at p. 18) that allowing contribution here would be problematic because Section 113 is premised on the common law right of contribution, and under common law, to bring a contribution claim, a party would have to extinguish the liability of the contribution defendant to the primary plaintiff. The United States is wrong. That may have been the prevailing common law rule, but it is certainly not the rule that underlies CERCLA.

Section 113(f)(3) of CERCLA, 42 U.S.C. § 9613(f)(3), explicitly provides that a liable party can be sued in contribution even if its liability to the government has not been extinguished. When a party settles with the government for some, but not all, of the government's

[11] Alternatively, the Court could determine, as the Ninth Circuit recently did, that the action seeking contribution can itself be viewed as an action under Section 107, and therefore it falls within the contours of the first sentence of Section 113(f)(1). See W. Props. Serv. Corp. v. Shell Oil Co., 358 F. 3d 678, 685 (9th Cir. 2004). Although this seems a less direct way to reach the same result, it is consistent with the United States' argument to the court of appeals in the Axel Johnson case, where the United States stated that "[t]echnically, all CERCLA actions for cost recovery are brought under section 107, which provides the elements of a claim for cost recovery and lists the liable parties and the defenses to liability. Section 113(f)(1) supplements section 107...." Axel Johnson Brief at p. 7, n.6.

response costs, the government may seek the remainder of its costs from non-settlors and the settlors may seek contribution from the non-settlors. Both claims may proceed simultaneously, with the sole proviso being that the government's claims have priority in payment. In other words, a party that unequivocally has not discharged another party's liability—the other party is still being sued by the government—continues to have a contribution claim under CERCLA.

That CERCLA deviates from earlier common law rules is not surprising. That is precisely what the United States had argued for prior to SARA's enactment. This can be seen by comparing the United States' position here to its position in 1985.

Present position: The United States now cites approvingly (at p. 18) to the Restatement of Torts: "As the Third Restatement of Torts explains, the right to contribution depends on the resolution of the underlying liability: 'A person seeking contribution must extinguish the liability of the person against whom contribution is sought for that portion of the liability, either by settlement with the plaintiff by satisfaction of judgment.'" The United States also cites approvingly (at p. 18, n.8) to Section 1(b) of the Uniform Contribution Among Tortfeasors Act ("UCTA").

Position in 1985: On February 5, 1985, EPA published in the Federal Register its Interim CERCLA Settlement Policy. See 50 Fed. Reg. 5034 (Feb. 5, 1985). This policy was issued jointly with the Department of Justice, and makes clear that a settlement with EPA will only release the liability of the settling party. Because that could preclude the settling party from having a contribution claim under common law rules, the policy opposed adoption of such rules or application of Section 1 of the UCTA, the very provision the United States now cites approvingly: "We do not support adopting section 1 of the Uniform Act as a Federal rule of decision. Section

1 would preclude settlors from seeking contribution from non-settlors unless the settlors financed or performed 100 percent cleanup at a site." Id. at 5043.

As the language of SARA makes clear, Congress followed the government's 1985 position. What this demonstrates is that CERCLA contribution rights are not premised on the narrow rules that existed under common law, but instead were intended to displace rigid common law contribution rights. The right of contribution created under CERCLA is broad and robust, precisely to encourage parties to undertake cleanup and pay governmental costs, with the promise that they in turn can sue other liable parties to recoup some of their expense.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

JOEL M. GROSS
Counsel of Record
THOMAS H. MILCH
THOMAS I. ANDERSON
ARNOLD & PORTER LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000

ALBERT M. COHEN
SMILAND & KACHIGIAN
601 South Fifth Street
Seventh Floor
Los Angeles, CA 90071
(213) 891-1010